IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1056 OF 2006

Kondaji Shivram Waje .. Appellant.
Vs.
Govinda Ananda (Deceased represented by LRs)
1.Hausabai Govind Waje & Ors. .. Respondents.

Mr.M.M.Sathaye for the appellant.
Mr.C.G.Gavnekar for respondent nos.3 and 4.

CORAM : D.B.BHOSALE, J.
DATED : 13TH MARCH, 2007

P.C.:

. Heard learned counsel for the parties.

2. This appeal is directed against concurrent judgments of the courts below by which a suit filed by the respondent-plaintiffs for possession has been decreed. The plaintiff had mortgaged the suit property to one Swarupchand. To get the suit property redeemed, the mother of the defendant had paid Rs.6,000/- to the plaintiff, and in turn he got the suit property redeemed and thereafter put the defendant in possession thereof and since the defendant refused to handover possession he filed the present suit. As against this the case set up by the defendant is that he paid the amount borrowed by the plaintiff directly to Swarupchand and thereby stepped into his shoes as mortgagee. Against the backdrop of these facts Mr.Sathaye, learned counsel for the

appellant submitted that without their being a prayer for redemption of mortgage, the suit for possession must fail. He further submitted that it is clear from the findings recorded by the courts below and more particularly the appellate court in paragraph 21 of the judgment that there existed debtor and creditor relationship between the parties and hence the courts below ought to have dismissed the suit for possession in the absence of a prayer for redemption of mortgage. In the alternative he also submitted that the doctrine of subrogation as reflected in section 92 of the Transfer of Property Act is also attracted and that has not been appreciated by the courts below in proper perspective.

3. In my opinion, both these submissions have no merit. The courts below have considered these points in proper perspective and have rightly rejected the submissions for the reasons recorded in the impugned judgment. It may be noticed that initially the appellant pleaded in the written statement that he is a tenant in the suit land. In view thereof the reference under section 85 of the Bombay Tenancy And Agricultural Lands Act, 1948 was made. After the Tenancy Authorities negatived the claim of the appellant that he is a tenant in the suit property, he seems to have changed his stand and started claiming that he stepped into the shoes of the mortgagee by

making payment to Swarupchand and hence the doctrine of subrogation is applicable. From bare perusal of section 91 and 92 of the Transfer of Property Act it is clear, as held by the courts below, that the doctrine of subrogation is not at all attracted in the present case. In my opinion, the courts below have appreciated the entire material on record in proper perspective and have rightly answered the issue "whether the suit is not tenable for want of redemption" in negative. I find no reason to interfere with the findings of fact and I find sufficient material on record to sustain those findings. Considering the extremely limited jurisdiction of this court to disturb the findings of fact, in my opinion, this appeal deserves to be dismissed. Order accordingly. At the request of learned counsel for the appellant the execution shall remain stayed for twelve weeks subject to the appellant filing an undertaking in this Court stating that they shall not create third party rights in the suit property part with the possession thereof, within a period of four weeks from today with an advance copy of the undertaking to the advocate for the respondents. If he fails to file such undertaking it will be open for the plaintiff to execute the decree. It is made clear that filing of the undertaking shall not curtail the right of the appellant to challenge this order in the Supreme Court.

(D.B.Bhosale, J.)